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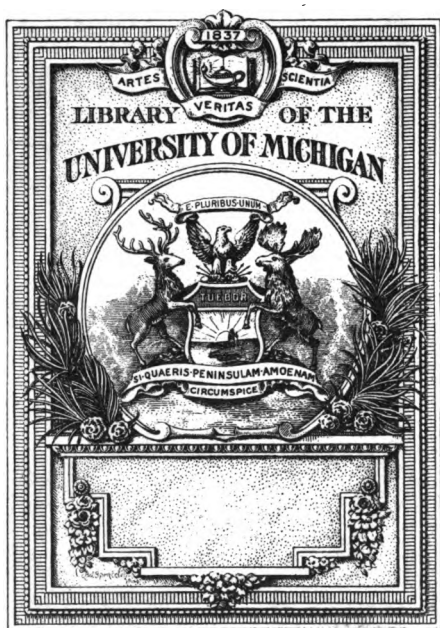
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Confiscation act of 1861

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Sept. 21, 1864

UNITED STATES CIRCUIT COURT,

Eastern District of Louisiana:

HON. E. H. BURELL, DISTRICT JUDGE, PRESIDING.

The Confiscation Act of 1861,

**FOR THE SEIZURE AND CONDEMNATION OF PROPERTY
USED FOR INSURRECTIONARY PURPOSES,**

AS PRIZE OF WAR.

**BRIEF IN THE CASES OF
THE UNITED STATES**

VS.

Clark's Foundry, the Ground on which it stands, etc.			
Phoenix Foundry,	"	"	"
Patterson Iron Works,	"	"	"
Crescent Cotton Press,	"	"	"
Alabama " "	"	"	"
Alabama Yard, No. 2,	"	"	"
Pelican Cotton Press,	"	"	"
Building, No. 22 St. Charles St.,	"	"	"

BY RUFUS WAPLES,

UNITED STATES ATTORNEY.

NEW ORLEANS:

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1864.

UNITED STATES CIRCUIT COURT,
EASTERN DISTRICT OF LOUISIANA.

BRIEF IN BEHALF OF THE GOVERNMENT

IN THE SEVERAL CASES BROUGHT UPON

THE CONFISCATION ACT OF 1861.

BY RUFUS WAPLES, U. S. ATTORNEY.

We propose to discuss the various questions that have been raised by opposing counsel in the cases at bar, instituted under the confiscation act of August 6, 1861.

This act is for the confiscation of "property used for insurrectionary purposes." It directs proceedings *in rem* for the condemnation of the offending thing. It also applies the rights of belligerents to captures made on land as well as upon water. It rests upon the right of Congress to provide for the forfeiture of property by the *actio in rem*, where the *jus in re* arises from some illegal act done by or with the thing; and also upon the right to "make rules concerning captures on land and water." The act declares property used for insurrectionary purposes to be "lawful subject of prize and capture, wherever found."

The property to be confiscated under this act is,

1. Property knowingly used by the owner in aiding insurrection;
2. Property purchased or acquired, sold or given, by the owner, or his agent or employé, with intent to aid insurrection;
3. Property which the owner consented to the use of, to aid insurrection;
4. Property which the owner consented to the use of, to aid, abet or promote *persons engaged* in insurrection;
5. Property which the owner *suffered* to be used to aid insurrection;
6. Property which the owner suffered to be used to aid *persons engaged* in aiding insurrection;
7. Property which the owner's *agent* suffered to be used in aiding insurrection;
8. Property which the owner's *agent* suffered to be used in aiding persons engaged in aiding insurrection.

THE PROCEEDINGS NOT IN PERSONAM.

The argument of several opposing counsel, that the act contemplates proceedings against persons, because the property to be confiscated is confined to that of the classes of persons mentioned in the act, may be briefly answered by referring to secs. 2 and 3, which provide for proceedings *in rem*. The libel strictly follows the act, and no objection has been made to its form. It is usual to set out the name of the owner of the property seized for forfeiture, or to
 r that it is the property of some person or persons

unknown. See and compare the libel drawn by Robert Treat Paine, Esq., Attorney General of Mass., which is fully set out in the confiscation case of *Martin (plff. in error) vs. the Commonwealth et. al., 1 Mass., 347.*

NOT CONFINED TO PERSONAL PROPERTY.

It would have been difficult for the law-makers to have used more comprehensive language than they have used. They were not content with the expression, "any property," but, as if foreseeing the disposition of counsel to confine its meaning, they said "any property of whatsoever kind or description." And "all such property is hereby declared to be lawful subject of prize and capture wherever found;" i. e., whether found in the enemy's country or not; whether on land or sea. The inference drawn by two of the opposing counsel, (Judge Buchanan and Mr. Rozier,) that because the phrase "wherever found" occurs, the act has reference only to moveables, is clearly in antagonism with the broad language of the act itself. Real estate is property of a kind and capable of description, and comes under the designation "any property of whatever kind or description." Had Congress meant otherwise, it would have treated of but one kind of property, *to-wit*: moveables. If real estate were incapable of being found, seized, captured, forfeited, confiscated, condemned as prize of war, then there might be some apparent apology for the construction sought to be given; but real estate enjoys no such immunity. It is confiscable by the laws of nations and by the Constitution and laws of the United

States, as enemy property, either on account of *use* or *ownership*.—4 Mason, 174 ; 6 Cranch, 286 ; 1 Mass., 347.

The provision in sec. 2, giving courts jurisdiction in the district in which the property may be seized, *or* in which it may be brought, is not exclusive of real estate. That which may be brought into a district is evidently moveable property, but that which is seized in any district may or may not be moveable. This section was somewhat relied upon by the counsel in oral argument, but seems to have been abandoned in their brief—(p. 2.)

NOT CONFINED TO SLAVES.

Another of the opposing counsel, (Mr. Durant,) suggests that the legislators meant to confiscate nothing but slaves. They say they meant to confiscate "any property of whatsoever kind," etc., if used for insurrectionary purposes. If any further answer is necessary, we refer to section 4, which treats of persons held to service, and which distinguishes between "property" and these so-called slaves, by providing that other persons claiming their service shall be debarred in certain cases, etc., etc. The first three sections provide for the confiscation of property in courts by proceedings in which the Government is to be the plaintiff: the last provides for a *plea in bar* in cases wherein so-called masters shall be plaintiffs, suing to enforce claims to the services of persons who have been forced by themselves to aid the enemy. The legislators have studiously avoided the use of the words "slave" and "property" in section 4,

when speaking of persons held to service, and it is not to be supposed that these persons have been treated of as "property," "prize," etc., by the same legislators, in the first three sections of the same act. The suggestion, therefore, that the law-makers treated exclusively of slave property, (to use a misnomer,) seems to us wholly untenable.

NO EXCLUSION OF CORPORATION PROPERTY.

The same learned counsel contends that property owned by corporations is not included in the act; that in speaking of "any property," etc., belonging to "any person," the legislators did not include property belonging to artificial persons. This proposition seems to us antagonistic to both the letter and the spirit of the statute. The letter is very expressive: "any person or persons, his, her or their agent, attorney or employé." The artificial person—the corporation—may "purchase or acquire, sell or give" property for insurrectionary purposes, or may use it for such purposes, just as well as a natural person. The fact that a corporation is a legal "person" brings it within the comprehensive term, "any person or persons."

The spirit of the law is manifest. There is just as much reason for preventing a corporation's foundry from making cannon for the enemy as there is for preventing a natural person's foundry being so used. There is as much reason for making prize of the one, after having been so prostituted, as there is of the other. The intention of the legislature was not to except the property of corporations, or they would have expressly excepted it. Imagine a member of

Congress offering an amendment to the act, when pending as a bill, that the property of corporations should be excepted: can any one, with the act, as passed, now before his eyes, conclude that such an amendment could have been adopted without materially changing the present meaning, scope and extent of the act? But we are saved further argument on this point by submitting the following authorities to show that "persons" includes artificial persons.—*I Blackstone*, 123; 4 *Bingham*. 669; *Woodeson's Lect.*, 116.

NO EXCLUSION OF ALIENS' PROPERTY.

It is further contended (by Mr. Rozier) that the property of aliens, although situated in this country and used for insurrectionary purposes, is not included in the terms "any property" of "any person." In other words, it is contended that the property of aliens, situated here, is privileged beyond that of citizens: a position which, we respectfully suggest, need not be argued. Aliens cannot hold lands in this country, except by statute, because they owe no allegiance to the Government—2 *Kent*, 56–61. No citizen or subject can hold lands under any government to which he does not owe allegiance, for allegiance is a condition precedent, or a covenant running with the land.—4 *Kent*, 427. In the United States aliens are suffered to hold lands, but they do not hold them by any natural right. To aver that, because they are allowed to own lands while they yield allegiance to a foreign power, their lands are, therefore, not answer-

ble to the laws as fully as the lands of a citizen, is to
 aver something not very susceptible of demonstration.
2 Dyer Insurance 623, 3 Fretw. C. Law 185, 2 Hall. 286.

PROPERTY USED IS "KNOWINGLY" USED.

It is contended that the 'Government is bound to prove knowledge on the part of those who have used property for insurrectionary purposes. The language of the statute is: "If any person, being the owner of any such property, shall *knowingly* use and employ," etc. If the word *knowingly* were stricken out, the meaning would not be changed, for the sentence is neither stronger nor weaker by its insertion. The eighth commandment would not be improved by writing it, "Thou shalt not *knowingly* steal." The law presumes everything that is done to be done knowingly: in other words, it presumes men to be sane until their insanity is made to appear by proof.

But it is argued that having alleged that the property was used knowingly, we are bound to prove the allegation. What the law presumes we are not bound to prove, although we allege it.

It will not be contended by our learned opponents that proceedings *in rem* and the statutes upon which they are based are to be more strictly construed than criminal statutes; and it is a criminal statute and a decision upon it which we now invoke as authority.

"If any owner, lessee, or occupant of any house, out-house, or other building shall *knowingly* permit or *suffer* any of the above-mentioned tables, bank, or games to be carried on or exhibited in their said houses, out-houses, or other buildings. and being thereof convicted, shall pay a fine of not less than

one hundred dollars, nor more than two thousand dollars."—*Sec. 68, p. 680, Howard & Hutchinson's Statutes of Miss.*

William H. Mount was indicted, under this statute, for "*knowingly suffering* a gaming table called a faro bank, to be exhibited in the house occupied by him." In the report of the case, it is stated that "by none of the witnesses was it proved that Mount was in the room, or knew of the dealing." "The defendant proved that he had leased the rooms to the occupants in which the exhibition took place, for a month, at one hundred and fifty dollars per month, during which time the dealing took place."

The defendant asked the court to instruct the jury, "That if they believed, from the evidence, that the defendant rented (to some other person) the rooms in which the exhibition took place, and during the tenancy the exhibition occurred; and that he rented the rooms in good faith, without any knowledge or expectation that they would be used for the exhibition of faro banks, he was not responsible for their exhibition during the continuance of the tenancy." The court refused to grant this instruction, and defendant excepted. The High Court of Errors and Appeals sustained the lower judge, and held that both the lessor and the lessee were liable under the statute.—*Mount vs. The State, 7 Smedes & Marshall, 277.*

The court will remark, that in this case the statute uses the words, "If any person * * * shall *knowingly* permit or *suffer*;" (the very words of the statute we are now discussing;) that the evidence failed to show that Mount was in the room, or knew

of the dealing; that the counsel in that case made precisely the same point that our learned opponents have made in these, and with more propriety, as they were in a criminal case and constructing a criminal statute; and yet both the lower and higher court held that the faro dealing having been in Mount's house, he was liable, as one who had *knowingly permitted or suffered* faro tables to be used, although the rooms in which they were used were leased to another person.

In the cases at bar, we have alleged that the property seized was knowingly used by the owner—used with his consent—suffered to be used, etc. The answers have denied these allegations, and we have re-affirmed them in replication. Where lies the burden of proof as to the *scienter* of the owner? Here is the law: "Although, in general, it is necessary for a party who brings an action to prove all the material facts which he alleges in support of his claim, yet, where the defendant pleads a fact within his own knowledge in discharge of himself, and the plaintiff still insists on the defendant's liability, alleging the same fact in his replication, there the burden of proof lies upon the defendant—not upon the plaintiff..

1 *Phillips on Ev.*, 199.

The owner of land is presumed to know whether his lands are in the adverse possession of another. *Lane vs. Shears*, 1 *Wend.*, 433; 2 *Phillips' Ev.*, 296; 1 *Saunders on Pleading*, 408; *Cross vs. U. S.*, 1 *Gallison*, 28. "Other presumptions of this class are founded upon the experience of human conduct in the course of trade; men being usually vigilant in guarding their property, and prompt in asserting their

rights, and orderly in conducting their affairs, and diligent in claiming and collecting their dues."—*I Greenleaf Ev.*, p. 102, sec. 38. See *Phillips on Ev.*, vol. I, pp. 156, 198; II, p. 289, note 298.

"In an action upon the case in tort for a breach of a warranty of goods, the *scienter* need not be laid in the declaration, nor, if charged, would it be proved." 1 *Chitty on Pleading*, 157. So in trover for taking and carrying away, it is not necessary, after having proved the taking and carrying away, to prove that defendant *knowingly* took and carried away—the law presumes that defendant knowingly took and carried away. See 3 *Cushing*, 279, on an indictment for "unlawfully suffering persons to resort, etc.;" to 4 *Mis.*, 474, for *permitting* gambling, etc.; to 11 *B. Mon. Ky. Rep.*, for *knowingly* permitting, etc." See, also, 9 *Met.*, 572; 12 *U. S. Digest*, 326 ~~120, 121~~.

REBEL OCCUPANCY OF THE CITY NOT A VALID EXCUSE.

Those who admit that their property was used for insurrectionary purposes, but set up, by way of *confession and avoidance*, that they were forced so to use it by superior power, must prove that *actual* force was exerted upon themselves; that it was *continued* force, and that it was so great that they could not resist it without losing their lives. If they could have escaped this force by leaving the country, or by quitting one avocation for another, or by lying in prison, then the force was not sufficient to excuse. The law fixes the measure of force or duress which will excuse, and the burden of proof is on the party alleging it. In *Foster's Crown Cases*, chap. 2, sec. 8, p. 216, of

the London edition of 1792, the law is given thus:

“The joining with rebels in an act of rebellion, or with enemies in acts of hostility, will make a man a traitor; in the one case within the clause of levying war, in the other within that of adhering to the king’s enemies. But, if this be done for fear of death, and while the party is under actual force, and he taketh the first opportunity that offereth to make his escape, this fear and compulsion will excuse him. It is, however, incumbent on the party who maketh fear and compulsion his defence, to show, to the satisfaction of the court and jury, that the compulsion continued during all the time he stayed with the rebels or enemies.”

“In the case of Alexander McGrowther, there was full evidence touching his having been in the rebellion, and his acting as a lieutenant in a regiment of the rebel army, called the Duke of *Perth’s* regiment. The defence he relied on was, that he was forced in; and to that purpose he called several witnesses, who in general swore that on the 28th of August, the person called the Duke of *Perth* and the Lord *Strathallan*, with about twenty Highlanders, came to the town where the prisoner lived; that on the same day three several summonses were sent out by the Duke requiring his tenants to meet him and to conduct him over a moor in the neighborhood, called Luiny Moor; that upon the third summons the prisoner, who is a tenant to the Duke, with about twelve of the tenants, appeared; that then the Duke proposed to them that they should

take arms and follow him into the rebellion; that the prisoner and the rest refused to go: whereupon, they were told that they should be forced, and cords were brought by the Duke's party, in order to bind them; and that then the prisoner and ten more went off, surrounded by the Duke's party.

"These witnesses swore that the Duke of *Perth* threatened to burn the houses and to drive off the cattle of such of the tenants as should refuse to follow him.

"They all spoke very extravagantly of the power lords in *Scotland* exercise over their tenants; and of the obedience (even to the joining in rebellion) which they expect from them."

In summing up, the Lord Chief Justice said, in response to these arguments:

"The fear of having houses burnt or goods spoiled, supposing that to have been the case of the prisoner, is no excuse in the eye of the law for joining and marching with rebels.

"The only force that doth excuse is a force upon *the person*, and present fear of death; and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man who makes force his defence, to show an actual force, and that he quitted the service as soon as he could, agreeably to the rule laid down in *Oldcastle's case*, that they joined *pro timore mortis*, and *recesserunt quam cito potuerunt*."—Foster's Crown Law, pp. 13, 14.

"All the judges that were in town were present," continues Foster, "and concurred in the points of law.

The jury, without going from the bar, found him guilty."

In 1 *Archbold's Crim. Practice*, 6th edition, 1853, p. 10-1, this case is cited as authority, and it is laid down as the law of the present day, that no threat to burn a man's house or destroy his property is sufficient to excuse him for joining rebels.—See 1 *Blackstone*, 30; 3 *Inst.*, 10; 1 *Hale*, 56. *Overland, 438, 545, Note 111.*

THE ACT OF AUG. 6, 1861, NOT REPEALED.

It is argued that the act of July 17, 1862, has repealed the act of 1861. There is no repealing clause, but three of our learned antagonists aver that the provisions of the latter act are inconsistent with the former. There is this remarkable distinction: the former is for the confiscation of property which has acquired its enemy character by *use*, while the latter is for the condemnation of property which has acquired that character by *ownership*. The Attorney General did not understand the former act to have been repealed, or he would not, in his circular to District Attorneys, under date of Jan. 8, 1863, have instructed them to carry the former act into execution. Congress did not consider the act of 1861 repealed or suspended, when they referred to it in the act of March 3, 1863—*XII Statutes at Large*, p. 762.

But it is contended that the provision in sec. 6, of the act of 1862, (providing that the persons described in that section who should not return to their allegiance within sixty days after the President's proclamation of July 25, 1862, should have their property

confiscated,) is applicable to the property seized in the cases at bar.

The act of 1861 confiscates property used for insurrectionary purposes; that of 1862, sec. 6, confiscates property of persons aiding the rebellion, unless they return to their allegiance within a given time. It is true that making cannon is aiding and abetting; it is equally true that the firing of cannon, by a major general, is also aiding and abetting—both being done in the cause of the rebellion. But aiding the rebellion has its degrees of guilt, and the law-making power may temper the punishment accordingly. It has made the general's property confiscable from July 17, 1862, while the private's property was not confiscable till Sept. 23, 1862. Thus much on the subject of confiscation of property acquiring its hostile character by ownership, treating the subject as though the confiscation was a penalty for crime. The confiscation, however, is not to punish criminals, but "to support the army," as the act of 1862 declares.

The act of 1861 is totally distinct from that of 1862. It matters not who owns the property—whether a general, a private or a non-combatant, if used for insurrectionary purposes by the owner, by his agent, by his employé, by his consent, by his sufferance, by being sold or given or leased by him for the purpose, it is declared to be lawful prize of war. It is in the same position as a vessel caught running the blockade. Counsel might just as well contend that running the blockade is aiding and abetting the rebellion, and that, therefore, those who took the oath of allegi-

ance prior to Sept. 23, 1862, cannot have their vessels confiscated.

THE "CONFEDERACY" NOT A DE FACTO GOVERNMENT.

In the joint brief of three of the opposing counsel (Messrs. Briggs, Buchanan and Rozier) it is contended that the claimants were bound to obey the rebel authorities, and to regard the so-called Confederacy as a *de facto* government. As they have not shown that they have acted under any order emanating from such government, the argument would not avail them even were it true that such *de facto* government existed. But we deny that it did exist. Had the "Confederacy" superseded the U. S. Government for a time, and existed as the only government of the country, although not a government *de jure*, it would have been such *de facto*, and persons yielding it obedience would not have been guilty of treason. But the claimants have no such plea. The authorities cited in the joint brief do not sustain their position. It is true that Vattel, Grotius and Blackstone hold that in civil wars there are two parties; and there are various other authorities to show that a nation may exercise the rights of war against rebellious subjects; but not that individuals, aiding in rebellion, are excusable before the Courts of the Sovereign on the ground that many other individuals participated in the same crime. The case cited in 2 Gallison is merely to the effect that the bringing of British goods from Halifax to Castine, while the latter place was in the possession of the British, was not a violation of the non-importation acts. It would be good authority to prove that the

taking of a cargo from France to Vera Cruz, by a Frenchman, while Vera Cruz is in possession of the French, could not be treated as a violation of a Mexican non-importation act, after the re-possession of Vera Cruz by the Mexican authorities. The other cases relied upon, (3 *Peters*, 100; 4 *Wheaton*, 246,) are equally inapplicable to the cases at bar. Do the learned counsel seriously contend that we really have two governments in this country, and that each "individual is left to attach himself to, and to become, by adoption at least, the subject of either government?" If they do not so contend, they do not bring themselves within the case supposed by Mr. Phillimore, *vol. 3, sec. 591*, which they have quoted. It is not true that the U. S. Supreme Court has arrived at the conclusion that the Government cannot, upon the resumption of its authority in any district of the country, enquire into and punish persons as criminals, and confiscate property for having been used in smuggling or for insurrectionary purposes. The recent decision in the case of the *Hiawatha et. al.*, shows that they have arrived at no such conclusion. If the learned counsel do not mean to quote Phillimore to sustain their proposition as stated by us, then we cannot see the object in quoting him at all.

Mr. Black's note in *Wheaton* goes only to show that a neutral power may treat either belligerent in a civil war as a nation, but does not go to show that the Courts of the Sovereign are bound to treat those rebelling against that sovereign as possessing any rights independent of the sovereign. The note was in reference to two American vessels which had

taken guano from a port temporarily under the authority of insurgents against the government of Peru, and he was writing about the rights of the United States, a third party. Mr. Cass' letter is about the same matter and to the same effect. So much for the authorities relied upon to prove the Confederacy a *de facto* government.

To prove that the rebels cannot shield themselves, in a court of the United States, under the plea that they have constituted a *de facto* government, we refer to Grotius de jure, lib. 3, chap. 2 sec. 9; Vattel's Droit des Gens, lib. 2, chap. 7, secs. 81, 82; Wheat. Int. Law, 369; 1 Kent, 57; 4 Cranch, 272; 7 Wheat., 306; 8 Cranch, 148; 2 Black. 636. We have already shown, under a different head, that the property of aliens, situated here, enjoys no immunity to which the property of citizens is not privileged.

THE PARDON PROCLAMATION DOES NOT AFFECT PROPERTY USED FOR INSURRECTIONARY PURPOSES, OR OTHER PROPERTY PROCEEDED AGAINST IN REM.

We have shown that the sixty days proclamation, calling upon the persons described in the 6th section of the confiscation act of 1862, to return to their allegiance, was not a proclamation of pardon or amnesty; but that, by the terms of that section, the property of the persons therein described *did not become confiscable* till the sixty days expired without their return to allegiance. That proclamation *affected no confiscable property*. Aiders and abettors, who took the oath of allegiance or otherwise returned to their fealty to the Government before the

23d Sept., 1862, *did not have the confiscability of their property cancelled*, but *avoided the arising of that confiscability*. In other words, they prevented their property from coming under any of the classifications of the act of 1862. This is written plainly in the act itself. "Sec. 6. That if any person * * other than those named * * *after the passage of this act, being engaged in armed rebellion* * * * shall not, within sixty days * * cease to aid, etc., * * all the estate * * of such person *shall be liable* to seizure * *."

This section has no reference to persons already liable under the act of 1861, but to persons who should aid the rebellion after July 17, 1862, and not cease before Sept. 23, 1862. It offers no pardon or amnesty, but simply describes a class of persons whose property should become confiscable in case they should not cease to be enemies before the expiration of the sixty days proclamation. The position taken by our learned opponents on this point is, therefore, manifestly untenable.

But the learned counsel for Mr. Eager has filed the oath of his client, taken under the President's proclamation of Dec. 14, 1863, to support the plea of pardon. We have demurred to the plea. Admitting that Mr. Eager is pardoned, we maintain that that pardon cannot affect *property* which had become "lawful subject of prize and capture" long before the date of the proclamation. This is a plea of confession and avoidance, and, therefore, it is an admission of all the allegations of the libel, and narrows the whole case, so far as Mr. Eager (with others who have filed the

plea) is concerned, to the question, *Is the confiscation of his property, used for insurrectionary purposes, avoided by the pardon?*

We should not give the proclamation such a construction as to make the President assume the power of annulling an act of Congress. He has, by the Constitution and by sec. 13 of the act of 1862, the right to pardon. But pardon is personal in its character, and relates to crime. It has, and can have, no reference to proceedings *in rem*. Persons indicted and convicted of crime, and sentenced to forfeit property as a penalty, may be pardoned—and the pardon may precede the conviction. But the pardon of a smuggler, either before or after indictment and conviction, could have no effect upon proceedings *in rem* for the confiscation of the smuggled goods. So the pardon of a person for treason, either before or after conviction for the crime, can have no effect upon the proceedings in the cases at bar. For “a pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed, from the *punishment* the law inflicts for a *crime* he has committed.”—7 *Pet. S. C. Rep.*, 160. The Constitution gives the President “the power to grant reprieves and pardons for *offences* against the United States.” The remittance of forfeitures is a different thing, and is exercised by the Secretary of the Treasury in certain cases. Pardon includes remittance of forfeiture when the forfeiture is inflicted as penalty for crime. But we have shown that forfeiture under the confiscation act of 1861, and under the confiscation sections (5, 6, 7, 8) of the act of 1862,

is not for crime. No one would contend that the confiscation of Mr. Eager's property under the present proceedings could be made the basis of the plea of *autrefois acquit* in a subsequent criminal proceeding against him.

No pardon can be carried beyond the express purport of it. 5 *Bac.* 291; 6 *Co.* 13. And this rule must apply, *a fortiori*, to a case where the interpretation, carried beyond the language of the pardon, would interfere with civil proceedings against property.

Again, if we should give the President's pardon the scope which learned counsel claim, we would interfere with vested rights. The act of 1861 provides that the informant shall receive a moiety, and his right to it dates from the seizure. Judge Story has stated the law on this point so fully that we adopt his language as a part of our brief. He says in *Jones vs. Shore's Executors*, 1 *Wheaton*, 470, in delivering the unanimous opinion of the Supreme Court: "It is not true that the right of a seizing officer to a distributive share is a mere expectancy. By the common law, a party entitled to a share of a thing forfeited, acquires by the seizure, an inchoate right, which is consummated by a decree of condemnation, and when so consummated, it relates back to the time of the seizure. This principle is familiarly applied to many cases of forfeitures to the crown; and even in respect to private persons entitled to forfeitures, the interest which is acquired by seizure, has been deemed a sufficient title to sustain an action of detinue for the property. And it is very clear that the legislature steadily kept in view this principle of the common law; for the act has expressly provided that

any officer entitled to a part of the forfeiture may be a witness at the trial; and in such a case, shall lose his share in the forfeiture. The law, therefore, deems him a party having a real, substantial interest in the cause, and not a mere expectancy. * * * So by the embargo act of the 9th January, 1809, ch. 72, s. 12, forfeitures recovered in consequence of any seizure made by the commander of any public armed vessel of the United States, are to be distributed according to the rules of the navy prize act of 22d April, 1800, ch. 33; and it is clear, beyond all doubt, that the parties so entitled, are the officers and crew at the time of the seizure. The analogous rule in cases of captures, *jure belli*, is here expressly alluded to, and adopted by the legislature; and that rule stands on the same general foundation with that of the common law. The right of captors to prizes is but an inchoate right, and until a condemnation, no absolute title attaches. But when condemnation has passed upon the property, it relates back to the capture, and although the parties have died in the intermediate time, the title vests in *proprio vigore* in their representatives." This decision has not reference to the rights of collectors alone, but also to those of informants. (See p. 473.) The same question came up before Judge Story, in the case of *Van Ness vs. Buel*, 4 *Wheat.* 76, in which he refers to the above case, and says that the question is no longer susceptible of argument. Again the Court were unanimous.

Even private inchoate interests cannot be divested by the pardoning power of the President.

In the case of the *U. S. vs. Lancaster*, 4 *Wash.* 64,

Mr. Justice Washington, after citing with approval the above two cases, and after commenting upon the act of April 3, 1797, authorizing the Secretary of the Treasury to remit forfeitures under the embargo laws, and after treating of the provision that nothing in the said act shall be so construed as to affect the right of any person to a part of the forfeiture, where the prosecution has been commenced, or information given before the passage of the act, says: "It certainly does not follow from this, that the pardoning power of the President extends to the barring of private inchoate interests, because he derives his prerogative to pardon under the Constitution, and its extent must be tested by that instrument." He then enquires whether the President's pardon in that case, affected the interests of the collector to his moiety. The President directed the proceedings on behalf of the United States to be discontinued. Mr. Justice Washington said, in deciding the case, "I am of opinion that the interests of the Custom House officers, in a moiety of this penalty, is not remitted or affected by the pardon," etc., and he gave judgment accordingly.

This accords well with the settled doctrine of the common law, that "the king cannot, in the exercise of his prerogative of pardon, defeat a legal interest or benefit vested in a subject; as, for example, an interest or right of action given by statute, to the party grieved, or even a popular action, after suit commenced."—5 *Bac.* 286, 287; *Chitty Cr. Law*, 742, 764; 3 *Inst.*, 240, 241.

There is not a law in the statute books of the country which as unequivocally vests rights in the inform-

ant as the confiscation act of 1861. The language of the third section is, "Any person may file information with such attorney, in which case the proceedings shall be for the use of such informer and the United States in equal parts." The informer has a right, in each of the cases at bar, equal to that of the United States. The President is the executive officer of the United States, but he holds no power of attorney from the informant to represent his interest. In his proclamation of Dec. 23, in speaking of restoration of rights of property, the President makes no distinction between the interests of the United States in the property seized and that other equal interest vested in the informant. The conclusion is irresistible, that he did not refer at all to property seized and proceeded against *in rem* under the confiscation act of 1861.

To what, then, does he refer? Section 13 of the act of 1862 authorizes him to extend to persons who may have participated in the rebellion, pardon and amnesty, but says nothing whatever of property. This authorization is cited by the President in the preamble to his pardon proclamation. The reference to restoration of rights of property may be satisfactorily explained (without doing violence to any principle of law or of interpretation) as meaning the remittance of the forfeitures mentioned in the first and second sections of the act of 1862.

The first section imposes a fine of \$10,000 and the freedom of the slaves of the person found guilty of treason, and further provides that this fine shall be

collected "on any or all of the property, real and personal, excluding slaves, of which the said person so convicted was the owner at the time of committing said crime, any sale or conveyance to the contrary notwithstanding." Section 2 has similar provisions. Section 3 provides, "that every person guilty of either of the offences described in this act shall be forever incapable and disqualified to hold any office under the United States." These provisions show very clearly what the President ~~meant~~ meant by the restoration of rights—rights to the forfeited privileges of citizenship—rights to property sold in collection of the fines imposed—and it renders perfectly intelligible the expression, "except as to slaves," which clearly refers to the sections we have quoted, where liberation of slaves is made part of the penalty for treason.

But the President's reference to the "restoration to rights of property except as to slaves" cannot be explained upon the theory of our learned opponents without doing violence to principles of law; (as we have shown above, in treating of the rights of informants;) therefore, we must give the President's language that interpretation which is consonant with law.

We respectfully submit, that our demurrer should be sustained; the plea in bar of confession and avoidance, overruled; and that, as a necessary consequence, there be judgment against Mr. Eager and all others, in the several cases, who have rested upon their pardon as an avoidance of their confessed acts. *Confessio facta in judicio omni probatione major est.*

INTERVENORS MUST BRING THEMSELVES WITHIN THE
ACT "TO PROTECT LIENS," ETC.

We have excepted to the interventions filed, on the ground that they are not such as are authorized by the act of March 3, 1863, "To protect liens upon vessels in certain cases, and for other purposes." The act provides that when a vessel or other property *shall be condemned* by virtue of the acts above mentioned, (referring to those of July 13, and Aug. 6, 1861,) a loyal citizen of the U. S., or of any foreign state at peace with us, may intervene—but only upon claims "under the laws of the U. S. or any loyal State thereof," that might have been specifically enforced against the thing seized, "in any loyal State wherein such claim arose."

We have already remarked that the confiscation act of 1861 applies the rights of belligerents to captures made upon land as well as upon water; that it declares property used for insurrectionary purposes to be "lawful subject of prize and capture, wherever found," and that it rests upon the right of Congress to "make rules concerning captures on land and water." Congress made it the duty of the President to have such prize property "seized, confiscated and condemned," and provided that such "prizes and captures shall be condemned * * * in any district in which the same may be *seized*," etc. The Court will observe that the words *capture* and *seizure* are used as synonyms throughout this act. We are relieved from any discussion on this subject, as the act itself expressly provides that property used for insurrectionary purposes, of whatsoever kind or description, is lawful subject of

prize and capture, wherever found. (See Story on the Constitution, vol. 2, pp. 96-103.)

Had not the act upon liens, etc., been passed, no interventions could have been entertained. This was the opinion of the law-makers, for otherwise the act "to protect liens," etc., would have been a work of mere supererogation. If all persons have a right to intervene, this law, giving certain citizens, upon a certain class of claims, the right, is meaningless. This evident opinion of the legislature is in perfect accordance with principles long settled by legal writers and the judiciary. It is well settled by authorities familiar to the Court, that the Government has the constitutional right to treat citizen-enemies in a civil war as it might treat foreign enemies in a public war, and that it belongs to the political power of the Government to declare what States are in insurrection. The proclamation of the President, declaring certain States in insurrection, is in evidence; and the legislation of Congress distinguishing between loyal and disloyal States is taken notice of by the Court. In Louisiana and other States similarly situated, no litigant is, or should be, allowed to appear in court before he has made oath of loyalty; no attorney is allowed to practice at this bar until he has made such an oath. Why? Let Chancellor Kent answer: "When war is duly declared, it is not merely a war between this and the adverse government in their political characters. Every man is in judgment of law a party to the acts of his own government, and a war between the governments of two nations is a war between all the individuals of the one, and all the individuals of

which the other nation is composed. Government is the representative of the will of all the people, and acts for the whole society. This is the theory in all governments, and the best writers on the law of nations concur in the doctrine, that when the sovereign of a state declares war against another sovereign, it implies that the whole nation declares war, and that all the subjects of the one are enemies to all the subjects of the other. According to strict authority, a State has a right to deal as an enemy with persons and property so found within its power, and to confiscate the property and detain the persons as prisoners of war."—1 Kent, 3d edition, pp. 54, 55; Upton's Prize Law, pp. 56-64, 20, 21, 108, 109, 110, 150, 151; 1 Duer Insurance, 509.

"The war puts an end at once to all dealing and all communication with each other, and places every individual of the respective governments, as well as the governments themselves, in a state of hostility: this is the received law of this country, and was so decided frequently by the Congress of the United States during the revolutionary war, and again by the Supreme Court of the U. S. during the last war."—1 Kent, 3 edition, p. 66.

In this respect the rule in cases of prize, whether of prizes on land or on water, is the same.—1 Kent, 3 ed., p. 71-79. "The prize law in times of war disregards all equitable liens on enemy's property, and lays its hands on the gross tangible property and relies on the simple title in the name and possession of the enemy. If it was to open the door to equitable claims, there would be no end to discussion and imposition, and the simplicity and celerity of proceedings

in prize courts would be lost.”—1 Kent, 3 ed., p. 87.

And Chancellor Kent is well supported by the decisions of the courts. In the case of *The Tobago*, 5 C. Rob., 218, it was held that bottomry on the enemy's ship is not an interest that can support a claim on behalf of the bondholder. The bottomry bond was given to a British merchant previous to the commencement of hostilities. The learned opinion of Sir Wm. Scott, discussing the reasons why the law will not enforce liens in such cases, we particularly commend to the attention of the Court. He says the consequence of allowing such claims would be that the captor “would be subject to the disadvantage of having liens set up to defeat his claims upon hostile property, whilst he could never entitle himself to any advantage from hostile liens upon neutral property. This court, therefore, excludes all consideration of liens or incumbrances of this species.” Thus in a British court, a British subject, upon the most favored of all claims, originating prior to the war, was not allowed to enforce his claim by way of intervention against property “declared to be lawful subject of prize and capture.” In support of the same principle we refer to *The Marianna*, 6 C. Rob., 24; *Schooner Rapid*, 1 Gallison, 295; 1 Duer on Insurance, 535–539; 8 Cranch, 335, 359.

“If mortgaged property is left in the possession of the mortgagor who puts it on board of the vessel of a belligerent, it is subject to capture, and the mortgagee is without remedy.”—*Bolchos vs. Three Negroes*, Bees' Rep. 74.

“An antecedent municipal forfeiture will not oust

the rights of captors under the grant of prize, but is absorbed in the more general operation of the law of war."—The *Sally*, 8 Cranch, 382.

"As against captors, prize courts recognize no lien upon enemy property, in favor of the consignee, for advances made by him to the shippers, whatever the doctrine of liens may give him."—The *Francis Irvin's* claim, 8 Cranch, 418.

"It may, however, be added, that a party, to be entitled to assert a claim in the prize court, must be the general owner of the property; for a person who has a mere lien on the property for a debt due, whether liquidated or unliquidated, is not so entitled."—2 Wheat. App., 21; Upton's Prize Law, 153–158. 146.

We submit to the Court that the above authorities fully sustain the proposition that no person can intervene upon any lien against property "declared to be lawful subject of prize and capture," under the confiscation act of 1861, unless they fall within the exception to this general rule by virtue of the act of March 3, 1863, "to protect liens," etc.

The intervenors, attempting to enforce liens in the cases at bar, have not brought themselves, by their pleadings, within the act of March 3, 1863. They have not alleged that act, nor have they alleged that they are loyal citizens of the United States, or of any peaceful foreign state, and that they hold liens by virtue of the laws of a loyal State, which, under those laws, may be specifically enforced against the things seized. We have excepted to their pleadings, and we insist that our exceptions should be sustained. Congress, in these and other laws, and the

President in his various proclamations, have distinguished between loyal and disloyal States. The terms mean something. If a vessel is proceeded against under the act of 1861, in the United States District Court of New York, a lien upon that vessel, under the laws of Massachusetts, is to be enforced; whilst a similar lien, under the laws of Louisiana, is not be enforced. If this is not a fair illustration of the meaning of the act of March 3, 1863, we are at a loss to imagine one.

To say that the portion of Louisiana in which this Court is situated is loyal, is not enough: for the language of the law is, "a loyal *State*." This State is declared by Congress and the President to be a disloyal State; and the Courts will regard the laws and proclamations as conclusive upon the question. We have already shown that owing to the presumption thus created against inhabitants of States declared disloyal, no litigants whatever, even though claiming the thing seized, are allowed to appear in court until they have removed that presumption; that counsel are obliged to remove the presumption before they can practice in court here; and we may further remark, that no one is allowed to vote in this State till he has taken the oath prescribed by the President's pardon proclamation. The reason is, that the *status* of the State creates the presumption of disloyalty against its inhabitants. How then can intervenors be allowed to appear and enforce a lien without compliance with the requirements of the act of March 3, 1863, the only provisions which allow them to appear at all?

Again—by that act no one can intervene on such liens *prior to the judgment of condemnation*. Between condemnation and distribution, intervenors on liens may appear, provided they bring themselves within the act creating this privilege. The provision of that act is, that when property shall be condemned under the act of August 6, 1861, or July 13, 1861, the court, *notwithstanding such condemnation*, shall provide for the payment of such liens. On this ground alone the interventions should be dismissed.

It is contended by the ingenious counsel of one of the intervenors, (Mr. Schmidt,) that this portion of Louisiana is not enemy's territory. Although in a war, a town or section of country may be successively held by different belligerents, yet that fact does not change the character of the place held, unless it is a permanent holding after hostilities have ceased between the belligerents. There might be some room for speculation upon the subject, and some play upon the term "enemy's country," had not the political power precluded it by deciding what are loyal States and what are not. This decision remains unaffected by any subsequent legislation or proclamations. The emancipation proclamation, (cited by Mr. Schmidt,) excepting certain parishes in Louisiana from its operation, does not declare Louisiana a loyal State. Prior to January 1, 1863, none of the disloyal States had had their slaves declared emancipated, and such is the condition now of the excepted parishes in Louisiana. •Portions of these parishes have since been in possession of the enemy: a fact that illustrates

the unsoundness of the position taken by the learned counsel.

Nor does the proclamation partially opening the port of New Orleans to trade, avail him any better. The fact that restrictions upon that trade exist and that permits are necessary, shows that the President did not mean to take Louisiana, by that proclamation, out of the category in which she had been placed by Congress. But even giving this partial opening of the port the most liberal construction, it would not enable an intervenor to assert a lien upon prize property, except by bringing himself within the law authorizing the appearance, without which there could be no appearance in such a case, as the authorities we have produced clearly show.

The *Amy Warwick* and *Castine* cases, cited by counsel, do not support his position, as to the political *status* of Louisiana. We have already had occasion to comment upon them, and we avoid repetition here. While it is true, as Judge Sprague says, that no nation makes a conquest of its own territory, yet it is equally true, as held in the same case, (*Amy Warwick*), on appeal, that the sovereign may treat rebellious citizens as foreign enemies, and their country as enemy's country. While it is true, as Wheaton says, in the paragraph quoted, that a nation acquires no new sovereignty by regaining possession of its own territory, the general doctrine is not denied by Wheaton, that the sovereign in civil wars has the same rights as in public wars.

The other authorities (by Mr. Schmidt) seem to us to apply rather to the merits of the case than to

the issue made by our exceptions; and we therefore refer to those parts of our brief in which the law upon the merits is discussed, where authorities will be found, we think, fully answering his argument. As all the arguments that have been used, orally or in briefs, to sustain the position of intervenors upon liens, have been set forth by the learned proctor whom we are answering, we deem it unnecessary to refer specially to each particular intervention. We respectfully, but earnestly, contend that these intervenors should not be heard until they have shown by their pleadings that they are among the privileged persons authorized to appear by the act of March 3, 1863.

Before leaving the subject of liens, however, we will remark, *en passant*, that the political power, in deciding what States *are* and what States *are not* loyal, had no reference to the former *status* of the States, when all were loyal. *Lex prospicit, non respicit.* If the law-makers had meant that South Carolina liens, originating before the commencement of hostilities, were to be enforced against a vessel libelled in New York, under the confiscation act of August 6, 1861, or July 13, 1861, they have used strange language in the expression of that meaning, when they created the right of intervening upon liens by passing the act of March 3, 1863. If South Carolina liens, originating before the war, cannot now be enforced in New York, what better position could they have under the law, if a United States Court should be established in Beaufort, S. C.? The learned coun-

sel are driven at once to the position that when the United States court shall be established there, the State will be loyal, and that then the act of 1861 cannot be enforced; that the act ceases to be operative in any section of country just so soon as that section is in a condition to allow it to operate; that proceedings which the act requires to be had in "the district or circuit court of the United States or in admiralty," are perfectly legal while no such courts can exist, and cease to be so, so soon as they can exist—the *reductio ad absurdum*.

LEGAL PROPOSITIONS ESTABLISHED.

We think we have established the following legal propositions:

I. That the proceedings at bar are strictly proceedings *in rem*; and that the libel strictly follows the act of Aug. 6, 1861, upon which it is based.

II. That the act is not confined to personal property or slaves, and is not exclusive of corporation property or of real estate or of aliens' property, but includes "any property of whatever kind or description."

III. That the law presumes property used to be knowingly used; and that proof of knowledge is not necessary, even when knowledge is alleged; that the consent and sufferance of the owner are also presumed.

IV. That when an agent, attorney or employé of an owner, with or without the knowledge of the owner, uses, or consents, or suffers to be used, property for insurrectionary purposes, the property is liable under the act.

V. That the leasing of property brings it under the terms purchasing or acquiring, selling or giving, as used in the act.

VI. That intervenors alleging liens upon the thing seized under the act declaring property used for insurrectionary purposes to be lawful subject of prize and capture, cannot be heard unless they bring themselves under the exception to the general rule, which exception is created by the act of March 3, 1863, "to protect liens, etc."

VII. That the burden of proof is on the claimant when he alleges that he was forced to use his property, or consent to its use, or suffer its use, for insurrectionary purposes; and that this proof must show actual force exerted upon himself personally of so violent a character as to threaten the life of the claimant setting up this plea; a continued force, threatening his life all the time the property was so used; not such a force as merely threatened the destruction and loss of his property, or the loss of his personal liberty; in short, such violent force as could not have been avoided by the abandonment of his property to the oppressor, and the absenting of himself from the country.

VIII. That the President's pardon is personal in its character, and has no other reference to property, and to the restoration of civil rights, than to property and civil rights liable to forfeiture under the *penal sections* of the act of July 17, 1862, and other penal acts.

IX. That the plea of violent force and of pardon are pleas of confession and avoidance, admitting the facts as alleged, and resting the claims of the persons

pleading them entirely upon the question whether the consequences of the confession are avoided.

THE PROOF OF THE FACTS ALLEGED IS COMPLETE.

In each of the cases at bar, we have proved that the property seized was used for insurrectionary purposes subsequently to the 16th of August, 1861, when the act went into effect. All property so used, was used knowingly, and with the consent or sufferance of the owner, as the law presumes.

This allegation being supported by presumption of law, requires no proof. In cases where the owners live abroad, we have proved that their agents suffered it to be used to aid insurrection, and also to aid persons engaged in insurrection. For instance, in the case of Clark's Foundry, Mr. Hopkins, the agent, is proved to have known that Clark was using the foundry for insurrectionary purposes; and he is also proved to have leased the property claimed by Mrs. Batson, his principal, after he had knowledge of the illegal use. True, a verbal lease had existed before; but after this verbal lease had been violated by the illegal use, he ratified and endorsed that use, by having a written lease executed, operating back to the time, and including the time in which this property was used for insurrectionary purposes. He also collected the rent for the property during the time, and paid it over to his principal. This agent both aided and abetted the rebellion, and aided and abetted Clark, a person engaged in rebellion, thus doubly bringing the property within the act. Messrs. Stanley and Eager cannot

defeat the operation of the law by their purchase of an interest in the property subsequently to its use.

In the case of the Phoenix Foundry, Mr. Leroy, the president, representing the corporation claiming ownership, is proved to have known of its illegal use; to have received the rent of the property, and to have suffered this use. So in all the cases at bar, the Foundries, Cotton Presses, etc., proceeded against, are proved to have been used for insurrectionary purposes; and, that they were all used with the knowledge, consent and sufferance of the owners, or their agents, attorneys or employees, is presumed by law, rendering proof superfluous.

THE CONFESSIONS NOT AVOIDED.

It is not proved by any claimant that he acted under any *orders* from the "government" said to have existed here, or by any order from any military or other official authority here, be that authority legal or illegal. No force whatever is proved to have been used; much less such force as the law requires in order to excuse. The testimony of some witnesses, in one or two cases, that if the persons using the property had not done it, the rebel authorities would have seized and used it, does not bring the claimants within the rule of law. If the rebels had threatened to destroy the property, which is not proved, that threat would not have brought claimants under the rule. There is a total failure to prove personal violence upon any owner or agent, for a single moment, much less, *continued per-*

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sonal violence, and threats of death during the whole time the property was used. The general assertion, that the whole community was under duress, and obliged to do treasonable acts, does not bring claimants under the rule. No claimant has attempted to prove, in his particular case, that the use of the property was not voluntary.

All the property seized in the cases at bar should be condemned,

1st. Because its illegal use has been proved; and .

2d. Because the claimants have "confessed," but not "avoided."

Respectfully submitted,

RUFUS WAPLES,

U. S. District Attorney.

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